

STATE OF MICHIGAN
COURT OF APPEALS

WIRELESS TOYZ FRANCHISE, L.L.C.,

Plaintiff/Counter-Defendant-
Appellee,

v

CLEAR CHOICE COMMUNICATION, INC.,
LAMAR KARMO, ALVIN KARMO, KHALED
NAJIIB, and KARMO GROUP, L.L.C.,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED
May 31, 2012

No. 303619
Oakland Circuit Court
LC No. 2007-084560-CK

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

Servitto, J. (*dissenting*).

I respectfully dissent.

As pointed out by the majority, the parties' agreement generally determines the scope of arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). Thus, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error." *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009) (internal quotation omitted).

Here, the stipulated order to submit the controversy to arbitration provided that "the parties shall arbitrate all pending claims, counterclaims and defenses raised in the above action based upon the terms and conditions set forth herein . . ." The order also stated that the arbitrator's decision would "represent a full and final resolution as to any claims, counterclaims and defenses filed in the above action . . ." While the majority interprets the above as limiting the scope of the arbitrator's authority to resolving only those matters actually filed and pending at the time the arbitration order was entered, (plaintiff's claim of innocent misrepresentation was never filed and was not pending at the time of the arbitration order), the language of the order does not suggest such a limitation.

First, the order allowed the parties to conduct further discovery. This provision indicates the possibility of additional facts being uncovered and developed after entry of the arbitration

order. According to plaintiff it was not, in fact, until after the arbitration order entered that they received discovery materials establishing the existence of a claim for misrepresentation.

Second, the arbitration order contemplated a “full and final resolution as to any claims, counterclaims and defenses filed in the above action . . .” A full and final resolution of the matter at hand cannot be had unless all claims between the parties arising out of their transactions are brought to the arbitrator’s attention. And, given that pursuant to relevant Michigan court rules (as discussed below), a pleading may be amended, and thus filed, at any time, to conform to the evidence, such matters may be addressed as discovery reveals.

Finally, and most importantly, the order provided the arbitrator would have all the powers of a circuit court judge and would apply the Michigan court rules in adjudicating the issues. MCR 2.118(C)(1) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

“An arbitration agreement is a contract whereby all the parties thereto agree to forego their rights to proceed with a court action and, instead, to submit their disputes to a panel of arbiters.” *Horn v Cooke*, 118 Mich App 740, 744; 325 NW2d 558 (1982). Thus, the arbitration stands in the place of a trial. Contrary to the majority’s assertion otherwise, then, MCR 2.118(C)(1) would apply in the same manner to an arbitration proceeding as it would to a trial. That being the case, the arbitrator’s opinion indicates the issue of defendants’ misrepresentation was tried:

the testimony and evidence demonstrates that, at the time the franchise agreements were executed, Clear Choice and the Karmo Group did in fact conceal who their true owners were. Clear Choice executed numerous documents representing its “owners” as Lama Karmo, Alvin Karmo and Khalid Najib [sic], when in fact Tarik Toma was also an owner. Similarly, the Karmo Group represented its owners as being Lamar Karmo and Alvin Karmo, when in fact Tamara Karmo was also an owner.

There is no indication in the record that defendants objected to the presentation of the evidence related to a claim of innocent misrepresentation or that this issue was outside the scope of arbitration until they moved to vacate the arbitration award. The arbitrator was at least arguably construing or applying the stipulated order and acting within the scope of his authority when he decided defendants’ acts constituted innocent misrepresentation. *Ann Arbor*, 284 Mich App at 144.

Taken as a whole, the stipulated order contemplated that the arbitration would include claims beyond those that were pending because it allowed discovery to continue, gave the arbitrator all the powers of a circuit court judge, and stated that the arbitration award would represent a “full and final resolution” to the matter. Additionally, the stipulated order did not explicitly exclude new claims from arbitration. The parties’ intent appears to have been that the arbitrator would determine all claims in the case. *Old Kent Bank v Sobczak*, 243 Mich App 57,

63; 620 NW2d 663 (2000). Thus, claims that were not pending at the time the stipulated order entered were not outside the scope of the arbitrator's powers. *Ann Arbor*, 284 Mich App at 144. I would therefore affirm.

/s/ Deborah A. Servitto